

JAMES M. WAGSTAFFE (95535)
IVO LABAR (203492)

KERR & WAGSTAFFE LLP
100 Spear Street, Suite 1800
San Francisco, CA 94105-1528
Telephone: (415) 371-8500
Fax: (415) 371-0500

Attorneys for Defendant
VICTOR CONTE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SHANE D. MOSLEY, SR.,

Plaintiff,

vs.

VICTOR CONTE,

Defendant.

Case No. C 08-01777 JSW

**DEFENDANT VICTOR CONTE'S
MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF
MOTION FOR SANCTIONS AND
ATTORNEYS' FEES (C.C.P. § 425.16(c))**

Hearing Date: December 24, 2008
Time: 9:00 a.m.
Courtroom: 2

HON. JEFFREY S. WHITE

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 This case was a defamation suit brought by professional boxer Shane Mosley against
 3 Victor Conte. After demanding immediate discovery and an expedited trial date, Mosley meekly
 4 dismissed his complaint in the face of a pending anti-SLAPP motion and a soon-to-be-filed
 5 motion to dismiss for lack of subject matter jurisdiction. Mosley should be ordered to pay
 6 attorneys' fees and costs for his abuse of the system under the Court's inherent authority or, in
 7 the alternative, pursuant to the fee shifting provisions of Code of Civil Procedure section 425.16,
 8 California's anti-SLAPP statute.

9 Mosley dismissed his complaint because the Defendant discovered that he intentionally
 10 misled the Court about his citizenship. In both a declaration filed in this action, and in his
 11 deposition, Mosley repeatedly asserted that he was a citizen of Nevada. The true facts were that
 12 Mosley is a longtime citizen of California. Indeed, a cross-complaint he filed in a another action,
 13 Mosley alleged he was a citizen of California. Just as egregiously, in his deposition in this action
 14 where he falsely claimed to be a citizen of Nevada, Mosley provided false testimony and
 15 concealed the existence of the California suit in which he was *in trial just two days earlier*.
 16 Mosley intentionally misled the Court about his citizenship in order to concoct jurisdiction in
 17 what he believed to be a more favorable venue. The Court, under its inherent authority, should
 18 order Mosley to pay all of the attorneys' fees and costs incurred in defending this abusive and
 19 meritless action. That amount is \$75,654.00.

20 In the alternative, Defendant is entitled to fees and costs because Plaintiff's defamation
 21 complaint was a meritless suit rising from Defendant's exercise of his free speech rights
 22 protected by California's anti-SLAPP statute, California Code of Civil Procedure ("C.C.P.")
 23 section 425.16. Mosley dismissed his case before Defendant's anti-SLAPP motion was heard.
 24 California law is clear: a plaintiff may not voluntarily dismiss his complaint in order to avoid
 25 attorneys' fees liability for a well-taken anti-SLAPP motion. ARP Pharmacy Svcs., Inc. v.
 26 Gallagher Bassett Svcs., Inc., 138 Cal. App. 4th 1307, 1323 (2006). Accordingly, Defendant
 27 brings this motion to recover fees (\$34,329.50) he reasonably incurred in defending against this
 28 SLAPP, to which he is entitled under the anti-SLAPP statute, C.C.P. § 425.16(c).

1 **II. BACKGROUND**

2 **A. MOSLEY FILES A DEFAMATION ACTION AGAINST CONTE**

3 This case arises from the well-publicized sports drug scandal involving professional
4 athletes' use of performance enhancing drugs provided by Bay Area Laboratory Cooperative
5 ("BALCO"). Defendant Victor Conte was the owner of the business. Shane Mosley was one of
6 the many athletes who have admitted to injecting illegal performance enhancing drugs supplied
7 by BALCO.

8 Taking a cue from the playbook of Marion Jones, another disgraced athlete linked to the
9 BALCO imbroglio, Mosley filed a defamation complaint against Conte on April 2, 2008.¹
10 Mosley's slander and libel claims were based on the puzzling proposition that he did not
11 "knowingly" inject himself with illegal performance enhancing drugs over the course of many
12 weeks before his professional bout with Oscar De La Hoya in 2005. In his complaint, Mosley
13 made the ludicrous allegations that Conte somehow fooled him into injecting banned substances
14 known as the "the Clear" and "the Cream." Subject matter jurisdiction was based on the
15 diversity statute, 28 U.S.C. section 1332. Mosley claimed to be a citizen of Nevada, and alleged
16 that Conte was a citizen of California. (*Complaint* ¶ 4).

17 Shortly after filing the complaint, and before Defendant's responsive pleading was filed,
18 Mosley filed a motion to for leave to conduct expedited discovery and trial. (*Docket. Nos. 16-*
19 *26*). Mosley sought a quick trial in the hopes of obtaining a permanent injunction that would
20 prohibit the publication of Conte's book that detailed Mosley's illegal drug use. The Court
21 granted expedited discovery, but later denied the motion to expedite the trial. (*Docket. Nos. 26,*
22
23

24 ¹ Sprinter Marion Jones filed a similar action, captioned as *Jones v. Conte, Case No. 04-*
25 *05312 SI*, in 2004. (*Declaration of Ivo Labar in Support of Defendant's Motion for Sanctions*
26 *and Attorneys' Fees (hereinafter "Labar Decl.") Exh. A, Jones Complaint*). Jones, like Mosley,
27 denied taking banned performance enhancing drugs. Jones was later prosecuted and sentenced to
28 six months in prison for lying about her use of banned performance enhancing drugs. (*Labar*
Decl. Exh. B, Jones News Article). Other professional athletes, such as Trevor Graham and
Barry Bonds, are also facing criminal prosecution arising from similar denials. (*Labar Decl.*
Exh. C, BALCO News Article).

46). In addition, the Court set a briefing schedule for Defendant's Special Motion to Strike and set a hearing on the motion for August 22, 2008. (*Docket No.47*).

In order to ascertain the truth about Mosley's claimed citizenship, Defendant took Mosley's deposition on July 9, 2008 in Los Angeles, California and also undertook other informal discovery efforts to acquire information about the same. (*Labar Decl. ¶ 5*). Shortly after Mosley's deposition, Defendant presented Plaintiff with a draft motion to dismiss for lack of subject matter jurisdiction. (*Id. ¶ 6*). After Defendant evidenced his intent to file the motion to dismiss for lack of subject matter jurisdiction, Plaintiff voluntarily dismissed his complaint with the SLAPP motion pending. (*Id.*; *see also Docket No. 66*). On the same day that Plaintiff dismissed his complaint, he re-filed his case in New York, a state that does not have a comparable anti-SLAPP statute. (*Id.*).

B. MOSLEY'S FALSE TESTIMONY REGARDING HIS CITIZENSHIP

1. Mosley, Under Oath, Falsely Claims to Be a Citizen of Nevada

As discussed above, Mosley's complaint alleged that he was a citizen of Nevada. (*Complaint ¶ 4*). On May 23, 2008, Mosley filed a declaration in support of his motion for an expedited trial. (*Labar Decl. Exh. E, Declaration of Shane Mosley "Mosley Decl."*). In an attempt to head off any dispute related to subject matter jurisdiction, the declaration stated, in pertinent part, that "Conte has also claimed that I am not a citizen of Nevada. This is also not true." (*Id. ¶ 8*). Mosley's declaration went on to list a handful of highly selective facts that he considered probative of his citizenship. (*Id. ¶¶ 9-16*). Mosley was deposed on July 9, 2008, and again claimed to be a citizen of Nevada. (*Labar Decl. Exh. D, Mosley Depo at 17:19-18:18*).

2. All of the Evidence Shows that Mosley is a Citizen of California

Mosley's declaration and deposition testimony omitted critical facts regarding his true citizenship. For example, Mosley invoked the jurisdiction of the California state courts in 2003, and claimed to be a resident of Los Angeles County.² (*Labar Decl. Exh. F*). He again invoked

² Critically, this was *after* Mosley purchased his first home in Nevada. (*Labar Decl. Exh. E, Mosley Decl. ¶ 9*).

1 the jurisdiction of California courts in 2007, claiming to be a California resident. (*Labar Decl.*
 2 *Exh. G*). Neither of these facts were noted in his declaration. The 2007 action, *Terrier Corp. v.*
 3 *Shane Mosley*, Case No. KC050549, involved a dispute related to a \$50,000 child's playground
 4 set that was installed at Mosley's mansion in La Verne, California. (*Labar Decl. Exh. H*).

5 Gallingly, just two days before his July 9, 2008 deposition in this case, Mosley was in
 6 trial in the *Terrier* action in California. (*Labar Decl. Exh. I*). Mosley never explained at
 7 deposition that he was just in trial in Los Angeles, nor that he filed a cross-complaint in that
 8 action on July 7, 2008 – just two days earlier – in which he claimed to be a California resident.³
 9 Indeed, Mosley did not mention the California trial at all, despite the fact that Defendant's
 10 counsel asked plain and simple questions regarding whether or not Mosley had ever testified in
 11 any trials or been a party to any lawsuits:

12 Q: Let me ask you -- go back to the topic of the lawsuits that
 13 you've been involved with. You told me about a lawsuit involving
 14 a gentleman named Mr. Wendell Wright and another lawsuit
 involving an entity called Ringside Tickets and a gentleman named
 Patrick Ortiz.

15 A: Yes.

16 Q: Can you recall any other lawsuits that you've been a party to?

17 A: No.

18 Q: Do you think there have been more and you just can't
 19 remember any of the details of them or do you think there haven't
 been any more than the two you've told me about?

20 A: Those are the -- the big lawsuits that stand out, but other than
 21 that, I can't really recall.

22 Q: Okay. You say those are the two big ones that you -- that
 stand out. Can you recall any small ones?

23 A: I mean those are -- that's really all I can recall at this point is
 24 those lawsuits. I mean that's it.

25 (*Labar Decl. Exh. D, Mosley Depo at 9:14-10:8*).

26
 27 ³ Mosley's misleading declaration and deposition testimony regarding his citizenship speak
 28 volumes as to the merits of his defamation claim.

1 Plainly, Mosley deliberately chose not to reveal the *Terrier* case, because he knew that it
 2 would prove that he was not a Nevada resident as he claimed to be. Besides claiming to be a
 3 California citizen when it suits him, all of the other evidence shows that Mosley has strong, fixed
 4 connections to California, where he has lived for his entire life.⁴ Mosley was born in Lynwood,
 5 California. (*Id. at 12:3-4*). He grew up in Pomona, California, and graduated high school there.
 6 (*Id. at 12:17-13:24*). After high school, he continued a career as a professional boxer. He
 7 purchased two homes in Pomona, and later moved to La Verne, California in 1997. (*Id.*).
 8 Although his career as a boxer takes him “everywhere,” he still owns the La Verne home as well
 9 as a house in Big Bear, California, where he was residing at the time the complaint in this action
 10 was filed. (*Id. at 16:8-23*).⁵ Neither of his homes in California were for sale at the time he filed
 11 this complaint. (*Id. at 44:6-12*). On the day this complaint was filed, Mosley was living and
 12 training at his Big Bear home. The fact that he was not physically present in Nevada at the time
 13 the complaint was filed should be dispositive of this issue of domicile.

14 There is no question Mosley’s personal life is also centered in California. Mosley’s
 15 spouse and children live in the La Verne home full-time. (*Id. at 14:11-16*). Each of his five
 16 children are enrolled in school there. (*Id. at 26:8-20*).⁶ In addition to his spouse and children,
 17 Mosley’s mother and father also live in Pomona, as does his sister. (*Id. at 26:21-27:5*).
 18 Critically, Mosley’s California-based father is also his primary boxing trainer and has been since
 19
 20

21 ⁴ Given Mosley’s longstanding, permanent connections to California, there is a
 22 presumption that California continues as his domicile. Hawes v. Club Ecuestre El Comandante,
 23 598 F.2d 698, 701 (1st Cir. 1979); Mitchell v. Unites States, 21 Wall. 350, 88 U.S. 350, 353
 24 (1874) (“domicile once acquired is presumed to continue until it is shown to have been
 changed.”).

25 ⁵ It is presumed that the state in which a person resides at any given time is also that
 person’s domicile. District of Columbia v. Murphy, 314 U.S. 441, 455 (1941).

26 ⁶ This crucial fact raises yet another presumption: for citizenship purposes, married people
 27 are presumed to be domiciled with their wife and family. Lew v. Moss, 797 F.2d 747, 750 (9th
 28 Cir. 1986); see also Wright, Miller, Cooper, 13B FEDERAL PRACTICE & PROCEDURE § 3612 at n.
 25 (2008).

1 Mosley was eight years old. (*Id. at 28:8-15*). Mosley does not explain how he permanently
 2 resides in a state apart from his primary trainer.

3 Mosley keeps clothing in California as well as his boxing training gear. When he is in
 4 California he has used his wife's automobile which is registered in California. (*Id. at 23:7-24:4*).
 5 At both of his homes in California, he has utility service, cable and satellite television and a
 6 home phone. (*Id. at 19:9-24; 24:8-15; 50:23-52:1*). The accounts for those services are in his
 7 name and he receives mail there. (*Id.; Labar Decl. Exhs. J-L*). His personal things, such as
 8 family portraits, wedding pictures, and personal financial records are also kept in California.
 9 (*Labar Decl. Exh. D, Mosley Depo. at 24:21-25:10*).

10 Mosley does his professional training at this home in Big Bear, California, where he also
 11 resides. Mosley has owned his Big Bear home for approximately seven years. (*Id. at 16:22-*
 12 *17:13*). The Big Bear home has a boxing gym, and Mosley uses it to prepare for his professional
 13 fights. (*Id. at 30:18-31:21*). Throughout 2007 and 2008, Mosley prepared for his fights there.
 14 (*Id.*). Again, at the time the lawsuit was filed, he was living and training at his Big Bear home
 15 where he spends months at a time. (*Id. at 30:18-31:21; 40:5-10*).

16 Mosley's other business affairs and other personal affairs are also centered in California.
 17 His wife works for his promotional company Sugar Shane, Inc. out of their home in La Verne.
 18 (*Id. at 25:11-26:7*). In addition, he is a partner with Oscar de La Hoya in Golden Boy
 19 Enterprises, which has its principal offices in Los Angeles. (*Id. at 36:19-37:12*).

20 His other business affairs (such as tax payment and money management) were handled
 21 for more than a decade by his aunt, another California citizen. (*Id. at 45:15-46:15*).⁷ His
 22 business affairs are currently handled by his money manager at UBS Warburg, who is located in
 23 Los Angeles. (*Id. at 20:7-21:5*). Mosley banks at national banks that have branches in
 24 California. (*Id. at 48:9-14*). Mosley uses those branches when he is in California. (*Id.*). The
 25
 26

27 ⁷ For a short time, his business affairs were handled by a certified public accountant
 28 ("CPA") in New York. (*Labar Decl. Exh. D, Mosley Depo. at 14:17-15:4*).

1 last time he saw a medical doctor, or a dentist, was in California.⁸ (*Id. at 32:9-33:20*). Mosley
 2 can only recall voting one time, and that was in California. (*Id. at 35:12-36:1*). The center of
 3 one's business, domestic and social life is strong evidence of domicile. REST. 2ND CONFLICT OF
 4 LAWS § 20 (2008). Here, all of the facts show that Mosley's "center" was in California at the
 5 time the action was commenced. Accordingly, he should be considered a California citizen.

6 Mosley admits that he spent a significant, if not the majority, of his time in 2007 and
 7 2008 in California. (*Labar Decl. Exh. D, Mosley Depo. at 30:18-31:21; 40:5-10*). Although
 8 Mosley could not say with any specificity how much time he spends in California vs. Nevada, he
 9 admits to moving back and forth between California "a lot."

10 Q: About how many times do you think you went back
 11 and forth from California and Nevada in the first three
 12 months of the year?

13 A: I couldn't tell you. I go back -- back and forth a lot.

14 (*Id. at 41:12-16*).

15 Mosley's testimony regarding his itinerant lifestyle is hard to square with his declaration
 16 regarding his residency that he filed in this case, where he stated that he spends "much of my
 17 time" in Las Vegas. (*Labar Decl. Exh. E, Mosley Decl. ¶ 16*). Putting Mosley's poor memory
 18 regarding his whereabouts in 2008 to one side, Mosley's testimony plainly shows that he did not
 19 intend to remain apart from his family or leave California permanently at the time the complaint
 20 was filed. (*Labar Decl. Exh. D, Mosley Depo. at 61:8-11*).

21 After his planned fight this past May in Las Vegas (that he was training for in Big Bear),
 22 Mosley intended to return to California with his family. (*Id. at 42:6-19*). Following his return to
 23 California, he intended to keep training in Big Bear:

24 Q: And do you intend to keep training for your fights in
 25 Big Bear?

26 _____
 27 ⁸ Mosley could not recall much about his medical providers, but documents provided by
 28 his counsel show that 15 out of 17 of his medical providers since 2002 are located in California.
 (*Labar Decl. Exh. M*).

1 A: Big Bear is, yeah, the training spot, yeah.

2 (*Id. at 43:13-15*).

3 Mosley also intended to keep being with his family in La Verne, at least until his eldest
4 son finished school:

5
6 Q: And you intend to keep seeing your family obviously
and your wife in California, right?

7 A: Yes.

8 ***
9

10 Q: And let me ask you as of, say, April 2008, this year, it
11 was your plan and intention to have your family remain in
12 California until your son complete school in California; is
that right?

13 A: As of April?

14 Q: Right.

15 A: Um, I would say yeah. *We were going to stay in*
16 *California*, but [I] was going to leave California after the
fight, which was May, for a period of time.

17 Q: Right. And you were going to return to California to
18 allow your child to finish school, right?

19 A: To finish school.

20 (*Id. at 43:16-18; 53:17-54:3*) (*emphasis added*).

21
22 Mosley's admission that he intended to stay in California with his family as of April 2008
23 is dispositive on the issue of intent. Regardless of Mosley's future plans possibly to move his
24 family to Nevada full time, at the time of the filing of the complaint, he intended to keep training
25 and living with his family in California. Under the "snapshot rule," it is clear that Mosley is a
26 citizen of California. At best, Mosley has produced evidence demonstrating that he is in the
27 process of relocating his domicile to Nevada. That, however, is not enough. Even if a plaintiff is
28 in the process of moving to another state, if the move was not complete when suit was filed,

1 plaintiff's domicile remains at his or her last residence. Heinz v. Havelock, 757 F. Supp. 1076,
 2 1079 (C.D. Cal. 1991) (Defendants had not yet completed planned move from California to
 3 North Carolina at the time the complaint was filed). At the time of the filing of the complaint,
 4 Mosley's present intention was to remain in California with his family.

5 While he could not definitely say at deposition how much time he actually spent in
 6 Nevada *vis-a-vis* California, he stated that it was almost an equal amount of time:

7 Q: Okay. And can you give me any percentage of how
 8 much time you spent in California versus Nevada in the
 9 year 2007?

10 A: I couldn't -- I couldn't tell you. *I mean it could be*
 11 *equally as much because I'm in Nevada or, you know, I'm*
 12 *all over the place. I'm not just in California and Nevada.*
 13 *I'm everywhere.* Wherever the promotion needs me to go, I
 14 go.

15 (*Id. at 57:20-58:2*) (*emphasis added*).

16 In light of this testimony, his declaration that he spends "much of his time" in Las Vegas
 17 is highly suspect. Third, Mosley's spontaneous deposition testimony reveals the truth about his
 18 intentions at the time the complaint was filed. Mosley intended to remain in California with his
 19 family until, at a minimum, his eldest son finished school. (*Id. at 56:3-57:2*). While Mosley
 20 may (or may not) intend to one day relocate to Nevada permanently, that day had not arrived at
 21 the time he filed the complaint in this case. As such, his future intentions are of no consequence
 22 to the citizenship inquiry. Heinz, 757 F. Supp. at 1079. Here, Mosley's actions and words
 23 demonstrate that he was a California citizen at the time of the filing of the complaint.

24 **III. THE COURT SHOULD SANCTION MOSLEY UNDER ITS INHERENT** 25 **POWERS**

26 **A. THE COURT HAS THE INHERENT POWERS TO SANCTION MOSLEY**

27 This Court has the "well-acknowledged *inherent power*...to levy sanctions in response to
 28 abusive litigation practices." Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980)
 (emphasis added and internal quotation marks omitted); see also Chambers v. NASCO, Inc., 501
 U.S. 32, 43 (1991); In re Itel Secs. Litig., 791 F.2d 672, 675 (9th Cir. 1986); Winn v. Associated

1 Press, 903 F. Supp. 575, 581 (S.D.N.Y. 1995) (“A federal district court possesses broad inherent
 2 power to impose sanctions in response to abusive litigation practices, thereby ensuring the proper
 3 administration of justice.”), *aff’d*, 104 F.3d 350 (2d Cir. 1996). This is true even if the court
 4 never possessed subject matter jurisdiction over the case. See Schlaifer Nance & Co., Inc. v.
 5 Estate of Warhol, 194 F.3d 323, 333 (2d Cir.1999) (“[E]ven when a district court lacks subject
 6 matter jurisdiction over an underlying action, it still possesses jurisdiction to impose sanctions
 7 arising from the underlying case.”).

8 This inherent authority encompasses a broad range of sanctions, including even dismissal
 9 “when a party has willfully deceived the court and engaged in conduct utterly inconsistent with
 10 the orderly administration of justice.” Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585, 589
 11 (9th Cir. 1983). As the Supreme Court has recognized, “[p]erjured testimony is an obvious and
 12 flagrant affront to the basic concepts of judicial proceedings.” United States v. Mandujano, 425
 13 U.S. 564, 576 (1976). “In any proceeding, whether judicial or administrative, deliberate
 14 falsehoods well may affect the dearest concerns of the parties before a tribunal and may put the
 15 factfinder and parties to the disadvantage, hindrance, and delay of ultimately extracting the truth
 16 by cross examination, by extraneous investigation or other collateral means. Perjury should be
 17 severely sanctioned in appropriate cases.” ABF Freight Systems, Inc. v. National Labor
 18 Relations Board, 510 U.S. 317, 323 (1994) (citations and internal quotation marks omitted); see
 19 also Pope v. Federal Express Corp., 974 F.2d 982, 984 (8th Cir. 1992) (false testimony “abuses
 20 the judicial process” and is sanctionable under court’s inherent authority).

21 A court may use its inherent power to sanction a party who makes false claims regarding
 22 the procedural basis for pursuing the case. Methode Electronics, Inc. v. Adam Technologies,
 23 Inc., 371 F.3d 923, 928 (7th Cir. 2004). In Methode, a party sought a temporary restraining
 24 order. Early discovery revealed that the verified complaint contained false venue allegations.
 25 The court sanctioned the attorneys and the party under its inherent authority. The court
 26 determined that “... not only that Methode’s venue allegations were false, but that Methode’s
 27 conduct in advancing them was intentionally deceptive.” *Id.* The Seventh Circuit affirmed the
 28 ruling on appeal, finding that the party acted in bad faith. As the court found, “[t]his was not a

question of mere negligence. It was an effort to deceive the court as to the existence of venue...”

Id.

Here, similar to the situation in Methode, Mosley knowingly and falsely testified about his citizenship in an effort to deceive the Court into retaining jurisdiction over this action. Mosley sought to deceive the Court and counsel as to critical jurisdictional facts that were highly relevant. Instead of being forthright, Mosley, like the litigant in Methode chose to deceive the Court. Such conduct should not go unpunished. It is well-settled that an award of attorneys’ fees and costs is an appropriate sanction for bad faith conduct such as this. Chambers, 501 U.S. at 43-45. The following chart summarizes Defendant’s lodestar amount of fees incurred in defending this baseless action:

<u>Attorney/Staff</u>	<u>Hours</u>	<u>Rate</u>	<u>Lodestar</u>
James M. Wagstaffe	20.30	495.00	\$10,048.50
Ivo Labar	153.70	375.00	\$57,637.50
Holly Hogan	22.00	235.00	\$5,170.00
Garfield Pallister (Paralegal)	11.70	130.00	\$1,521.00
Sarah Smoot (Paralegal)	11.20	110.00	\$1,232.00
Michael McCarthy (Case Clerk)	.90	50.00	\$45.00

Total Fees: \$75,654.00

(Declaration of James M. Wagstaffe in Support of Defendant’s Motion for Sanctions and Attorneys’ Fees (hereinafter “Wagstaffe Decl.”) ¶ 6).

Defendant respectfully requests that the Court award the entire amount of fees incurred in defending this action as a sanction for Mosley’s bad faith conduct.

IV. DEFENDANT IS ENTITLED TO ATTORNEYS’ FEES FOR THE ANTI-SLAPP MOTION

A. DEFENDANT IS ENTITLED TO LEGAL FEES UNDER CALIFORNIA C.C.P. § 425.16(C)

In the alternative, Defendant is entitled to attorneys’ fees and costs incurred in preparing and filing the anti-SLAPP motion. The purpose of the anti-SLAPP law is to protect the rights of

persons and newspapers to speak freely on public issues without being deterred or chilled by subsequent libel litigation. C.C.P. § 425.16(a). To effectuate its purpose, section 425.16(c) provides that a prevailing defendant on a Special Motion to Strike shall be entitled to recover his or her attorneys' fees and costs. *Id.* A party "prevails" under section 425.16 when the plaintiff voluntarily dismisses his complaint in the face of a pending SLAPP motion. ARP Pharmacy, 138 Cal. App. 4th at 1323.

Given that Plaintiff voluntarily dismissed his case in the face of Defendant's anti-SLAPP motion, Defendant is, therefore, the prevailing party and entitled to recover his attorneys' fees and costs under section 425.16(c).

Section 425.16(c), which provides "financial relief in the form of attorney's fees and costs, to persons who have been victimized by meritless, retaliatory SLAPP lawsuits," is an important part of California's anti-SLAPP legislation. Moore v. Liu, 69 Cal. App. 4th 745, 748 (1999). The purpose of the fee provision of the anti-SLAPP statute is to make the defendants whole financially so as to "adequately compensate the defendant for the expense of responding to a baseless lawsuit." Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 785 (1996). In addition, the "awarding of reasonable attorneys' fees" to defendants who prevail against SLAPPs "will discourage the filing of SLAPP lawsuits." Hull v. Rossi, 13 Cal. App. 4th 1763, 1769 (1993). In 1997, the Legislature amended section 425.16 to clarify its original intent that the "section shall be construed broadly." C.C.P. § 425.16(a). This directive applies to the entire section and, thus, under section 425.16(c), as a prevailing defendant, Conte should be reimbursed for all fees and costs reasonably related to defending this SLAPP.

B. THE AMOUNT OF ATTORNEYS' FEES REQUESTED BY DEFENDANT IS REASONABLE

When fees are to be awarded under a fee-shifting statute (such as § 425.16(c)), the "parties who qualify for a fee should recover all hours reasonably spent." Serrano v. Unruh, 32 Cal. 3d 621, 633 (1982). The method for determining the amount of reasonable attorneys' fees is well established: the base or lodestar is first computed by multiplying the number of hours reasonably spent by the reasonable hourly rate for each attorney. See Flannery v. California

Highway Patrol, 61 Cal. App. 4th 629, 646 (1998). Also included in the lodestar are out-of-pocket expenses of the type normally billed to fee-paying clients. Beasley v. Wells Fargo Bank, 235 Cal. App. 3d 1407, 1419 (1991). Although a fee claimant can then request an increase in the lodestar by a multiplier, Defendant did not do so here.

As demonstrated in the Wagstaffe Declaration, at paragraph 8, both the number of hours and the hourly rate charged for the anti-SLAPP work (not including the fees motion) are reasonable. The following chart summarizes Defendant's lodestar:

<u>Attorney/Staff</u>	<u>Hours</u>	<u>Rate</u>	<u>Lodestar</u>
James M. Wagstaffe	10.60	495.00	\$5,247.00
Ivo Labar	75.50	375.00	\$28,312.50
Holly Hogan	.40	235.00	\$94.00
Garfield Pallister (Paralegal)	1.90	130.00	\$247.00
Sarah Smoot (Paralegal)	3.90	110.00	\$429.00

Total Fees: \$34,329.50

1. The number of hours claimed is reasonable.

As shown in the Wagstaffe Declaration, the number of hours billed in defense of this SLAPP indisputably is reasonable. Defendant's counsel had to do a substantial amount of work in support of the motion to strike, including gathering background information, working with Conte, other percipient witnesses and their counsel, analyzing various affirmative defenses related to the anti-SLAPP, researching the grounds to be set forth in an anti-SLAPP Special Motion to Strike, drafting that motion, preparing for oral argument, preparing the proposed order, and preparing the instant motion for fees. The hours are reasonable as reflected in the contemporaneously kept and detailed time records that describe the activities for which compensation is claimed. (*Wagstaffe Decl.* ¶ 8 & *Exh. A*). Even if hindsight could be utilized to second-guess certain time entries, which it cannot, Woolridge v. Marlene Indus. Corp. 898 F.2d 1169, 1177 (6th Cir. 1990) (standard is attorneys' reasonable belief at the time, not hindsight analysis), the fees requested in this case are particularly reasonable.

1 If one were to take a “gestalt” view of the reasonableness of the fees, the total amount
 2 charged is exceptionally low. The amount requested here is well below amounts awarded for
 3 work on anti-SLAPP motions in the trial court in other cases, including several affirmed on
 4 appeal. (*Wagstaffe Decl. at ¶ 11.*) The request here is well below amounts awarded for work on
 5 the anti-SLAPP motions in the trial courts in other cases, including several affirmed on appeal.
 6 For example, in the Lafayette Morehouse, Inc. v. Chronicle Publishing Co., a case decided over
 7 ten years ago at substantially lower rates, the court awarded in excess of \$100,000.00 as a
 8 reasonable attorney fee. (*Id.*) And while the Court of Appeal, in its second opinion rendered
 9 before the later statutory amendment compelling a broad reading of the anti-SLAPP law, allowed
 10 fees on the motion itself, the trial court on remand (Hon. William Cahill) allowed all fees
 11 expended on the defense except for a small amount of time spent on a motion to quash for a
 12 collateral defendant. (*Id.*) Thus, the court awarded fees for client meetings, review of the
 13 complaint, discovery analysis and work on the appeal. Similarly, in the Church of Scientology v.
 14 Wollersheim case, the court awarded in excess of \$90,000.00 in reasonable attorneys’ fees over a
 15 decade ago. (*Id.*) The amount sought here, a fraction of those figures, is both reasonable and
 16 reflects the skill and expertise of the attorneys involved.

17 **2. The hourly rates sought by counsel are reasonable.**

18 Defendant’s attorneys are entitled to be compensated at hourly rates that reflect the
 19 reasonable market value of their services in the community. Serrano, 32 Cal. 3d at 643. The
 20 declaration filed herewith amply demonstrates the extensive level of experience of the lawyers
 21 involved and that their hourly rates are at or below reasonable market value for this community.
 22 (*Wagstaffe Decl. at ¶¶ 4-5.*)

23 **3. Defendant is entitled to recover fees for filing this fees motion.**

24 It is settled law that fees recoverable under a mandatory fee statute, such as involved in
 25 this case, include fees incurred in presenting and arguing the fees motion. In this particular
 26 matter, Defendant has reasonably expended nine hours in preparing this fee petition at a total
 27 cost of \$3,615. (*Wagstaffe Decl. ¶ 9.*) It is estimated that a reply brief will require an additional
 28 five hours (\$1,995) and the oral argument will require three hours (\$1,365). (*Id.*). Thus, the total

1 amount of \$6,975 sought for the preparation and presentation of this motion is exceedingly
2 reasonable. (*Id.*)

3 **V. CONCLUSION**

4 Mosley filed this case knowing that complete diversity, and therefore subject matter
5 jurisdiction, was lacking over this case. When this issue was raised in discovery, Mosley
6 persisted in falsely claiming that he was a citizen of Nevada. Such conduct is sanctionable under
7 the Court's inherent powers, and Mosley should be ordered to pay the attorneys' fees incurred in
8 defending this meritless action.

9 In the alternative, Defendant respectfully requests that he be awarded his reasonable
10 attorneys' fees in the amount of \$34,329.50, pursuant to California Code of Civil Procedure
11 section 425.16(c).

12
13 DATED: August 28, 2008

Respectfully submitted,

14 **KERR & WAGSTAFFE LLP**

15
16 By _____/s/_____
IVO LABAR

17
18 Attorneys for Defendant
Victor Conte